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Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

KITTERY RETAIL VENTURES, LLC; DSS LAND HOLDINGS, LLC; and STEPHEN A. HYNES,

Petitioners,

v.

TOWN OF KITTERY,

Respondents.

On Petition for Writ of Certiorari to the Supreme Judicial Court of the State of Maine

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Town of Kittery, Maine, adopted an ordinance that retroactively changed the zoning law that applied to Petitioners' property.

The question presented is:

Whether a landowner with a pending but unvested permit application is entitled to judicial review under the Due Process Clause when the *retroactive* application of a new zoning law causes the permit to be denied?

LIST OF PARTIES

The Petitioners are Kittery Retail Ventures, LLC; DSS Land Holdings, LLC; and Stephen A. Hynes.

The Respondent is the Town of Kittery, Maine.

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

None of the Petitioners have any parent corporations or have 10% or more of their stock owned by another publicly held company.

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PETITION FOR WRIT OF CERTIORARI

Kittery Retail Ventures, LLC; DSS Land Holdings, LLC; and Stephen A. Hynes respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Maine.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Maine, *Kittery Retail Ventures, LLC, v. Town of Kittery* is reported at 856 A.2d 1183, 2004 ME 65 (2004), and is reproduced as Petitioners' Appendix (Pet. App.) at A-1.

On August 12, 2004, the Supreme Judicial Court of Maine denied Petitioners' motion for reconsideration in an order reproduced as Pet. App. at B-1.

The opinion of the Superior Court of Maine in this case, Docket No. Civ. A CV-02-162, is not officially reported, but can be found at 2003 WL 21386952 (Me. Super.), and is reproduced as Pet. App. at C-1.

A prior opinion by the Superior Court of Maine in a prior stage of this case, Docket No. Civ. A. AP-00-103, is also not officially reported, but can be found at 2002 WL 746114 (Me. Super.), and is reproduced as Pet. App. at D-1.

JURISDICTION

The Supreme Judicial Court of Maine issued its opinion in this case on May 11, 2004. Pet. App. at A-1. It denied Petitioners' motion for reconsideration on August 12, 2004. Pet. App. at B-1.

On November 2, 2004, this Court granted an extension of time to file this petition for writ of certiorari to January 9, 2004.

See Pet. App. at E-1. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution states in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution states in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

The Town of Kittery, Maine, Land Use and Development Code Zoning Ordinance, effective when Kittery Retail obtained the first substantive review of its permit application on July 13, 2000, read in relevant part:

> Sec. 16.12.130 Mixed Use - MU
>
> D. Standards.
>
> 2. Retail Use Limitation. Retail use, including parking areas and other supporting unvegetated areas for retail use, is limited to not more than thirty (30) percent of the developable area of any lot or portion of a lot within the mixed use district, unless the planning board has approved the transfer of unused retail development rights from one lot to another in the mixed use district.

The Town of Kittery, Maine, Land Use and Development Code Zoning Ordinance, as adopted on September 20, 2000, reads in relevant part:

Sec. 16.12.130 Mixed Use - MU

D. Standards.

2. Retail Use Limitation. Retail use, including parking areas and other supporting unvegetated areas for retail use, is limited to not more than fifteen (15) percent of the developable area of any lot or portion of a lot within the mixed use district. Notwithstanding the provisions of M.R.S.A. § 302, and regardless of the date on which it is approved by the voters, this amendment shall be effective as of September 30, 1999, and shall govern any and all applications for permits or approvals under the Land Use and Development Code of the Town of Kittery, Maine, that were on or have been pending before any officer, board or agency of the Town of Kittery on or at any time after September 30, 1999.

STATEMENT OF THE CASE

In this case, the landowners diligently pursued all of a town's zoning and permitting requirements by submitting an application to build a retail center. Ultimately, however, an election was held that *retroactively* changed the local zoning code, making the project infeasible from *before* the date the owners submitted their application. At its core, this case is about whether the landowners are entitled to judicial review of the Town's actions under the Due Process Clause of the United States Constitution, and whether, upon review, the Town violated the owners' rights of due process.

A. Factual History

1. Property Interest

In 1999, Petitioner Kittery Retail Ventures acquired an option interest from Petitioners DSS Land Holdings and Stephen A. Hynes, trustee of Real Property Trust Agreement (all three will be collectively referred to as Kittery Retail), to purchase two parcels of adjoining land located close to Route 1 in Kittery, Maine. Superior Court Opinion, Pet. App. at C-1 and Opinion, Pet. App. at A-2, ¶ 2.

2. Original Land Use Regulations and Owner Intentions

According to the Town's land use and zoning ordinance in 1999, the property was in a "mixed use" zone where 30% of the property could be devoted to retail use, and the land was eligible for receiving additional retail development rights, making it suitable for a "well-designed, multistore retail project . . . rather than . . . a proliferation of individual retail stores on individual parcels." Pet App at A-2 (citing Kittery, Me., Land Use and Development Code Zoning Ordinance § 16.12.130(D)(9) (May 1988)). Kittery Retail Ventures intended to build Kittery Marketplace, a 250,000 square-foot retail outlet mall. Pet. App. at A-2. It was a combination of the 30% land coverage regulation combined with the ability to buy transferable development rights from other owners within the mixed use zone that made the project viable. *See* Affidavit of Edward W. Huminick, manager of Kittery Retail Ventures, at ¶ 4, found in Appellants' Appendix before the Maine Supreme Court at 51.

3. Application History and Retroactive Changes in Town's Zoning Laws

In procedures beginning on January 13, 2000, and culminating on March 23, 2000, Kittery Retail filed a site plan application and tendered its application fee. Pet. App. at A-2,

¶ 2. During this time, on March 6, 2000, a proposed emergency ordinance failed before the Town Council. That failed ordinance would have changed the Town's zoning laws so as to strip away Kittery Retail's right to purchase and use retail development credits and would have amended the mixed-use district land coverage ratio, making the planned project impossible. *See* Pet. App. at A-3, ¶ 3.

However, on March 27, 2000, a citizen group filed a petition for an initiative that accomplished the same changes in the Town's zoning laws. Pet. App. at A-3, ¶ 3. On June 13, 2000, the initiative was approved, with an effective date of July 14, 2000. Pet. App. at A-3, ¶ 4. *Before* the date this ordinance became effective, Kittery Retail submitted a revised preliminary plan application. On July 13, 2000, the Board voted unanimously to approve, as substantially complete, the site plan for the Kittery Marketplace and accepted the application for review. Pet. App. at A-3, ¶ 5. Had the initiative been applied to the property, the project could not have gone forward.

On September 26, 2000, the voters approved another amendment, this time making the previous changes retroactive:

> [T]his amendment shall be effective as of September 30, 1999, and shall govern any and all applications for permits or approvals required under the Land Use and Development Code of the Town of Kittery, Maine, that were or have been pending before any officer, board, or agency of the Town of Kittery on or at any time after September 30, 1999.

Pet. App. at A-4, ¶ 6. On October 26, 2000, the Town planner notified Kittery Retail that the new amendment would apply to the property. Pet. App. at A-4, ¶ 6. By this time, in addition to entering contracts totaling 10.2 million dollars to purchase the property, Kittery Retail Ventures had spent over $300,000 pursuing the development application after receiving assurances that the project was safe from further zoning changes. *See*

Plaintiffs' Statement of Material Facts, ¶¶ 1 and 40, found in Appellants' Appendix in the Maine Supreme Court at 39 and 48, citing to Affidavit of Edward W. Huminick, Exhibit A to Plaintiffs' Statement of Material Facts, at ¶ 2 (purchase price) and ¶ 27 (development costs after assurances of zoning stability), found in Appellants' Appendix in the Maine Supreme Court at 50 and 56.

B. Procedural History

1. First Complaint

After receiving notification from the Town planner that the new amendment would apply, Kittery Retail filed a complaint against the Town. This was dismissed without prejudice on April 4, 2002, because the notification from the Town planner did not constitute a final Board decision. Pet. App. at A-4, ¶ 6, and Pet. App. at C-1.

2. Second Complaint

Following the dismissal of the first complaint, the Board on May 9, 2002, "formally denied [Kittery Retail's] development application on the basis that it did not comply with the zoning ordinance as amended by the September amendment." Pet. App. at A-4, ¶ 6. On May 13, 2002, Kittery Retail filed a second complaint. *See* Pet. App. at A-4, ¶ 7. Count I alleged that the Board's decision was "arbitrary, capricious, and unlawful." Pet. App. at A-4, ¶7, Complaint at ¶ 43, at Appellants' Appendix in the Maine Supreme Court at 20. Count II "requested a declaratory judgment that the terms of the September amendment could not be applied to its application." Pet. App. at A-4, ¶7. Count II challenged the Town's action on multiple theories including the Due Process, Equal Protection, Contracts, and Takings clauses of the United States Constitution. Pet. App. at C-6, Complaint at ¶¶ 45-47 at Appellants' Appendix in the Maine Supreme Court at 20.

On May 29, 2003, the Superior Court of Maine entered summary judgment against Kittery Retail on both counts. Pet. App. at C-6 to C-7. With respect to the due process claim, the superior court concluded that the retroactive "ordinance is permissible because it furthers legitimate legislative purposes of regulating development and it does so by a rational means." Pet. App. at C-6. Kittery Retail appealed. Pet. App. at A-4 to A-5 ¶8.

Kittery Retail appealed to the Supreme Judicial Court of Maine. On May 11, 2004, that court affirmed. Although it ruled that the September amendment's "effective date" violated the Town's charter, it also held that the Town could retroactively *apply* the amendment. Pet. App. at A-7 to A8, ¶¶ 13, 16, and 17.[1]

In upholding the retroactive application of the amendment, the court concluded that the amendment "operates to require denial" of Kittery Retail's application. Pet. App. at A-10 to A11, ¶ 22. The court continued that Kittery Retail did not acquire vested rights, through bad faith (as Kittery alleged that the targeted nature of the retroactive application of the ordinance gave rise to a vested right under Maine law), or the submission of a development application. Pet. App. at A-11 to A-14, ¶¶ 23-31.

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[1] The Maine court's distinction between an ordinance that is "applied" retroactively and one that becomes "effective" retroactively is a bit obscure. *See* Pet. App. at A-7 to A-8, ¶¶14, 15 and 16: "[N]ot only does it [the September amendment] purport to apply retroactively by affecting the consequences of actions taken prior to its effective date, it explicitly purports to become *effective* retroactively." *Id.* at ¶ 16. In any event, while the court struck down the retroactive *effective* date, it upheld the retroactive *application* of the ordinance. It is the retroactive application of the amendment that is the subject of this petition.

With respect to Kittery Retail's claim under the federal Constitution's Due Process Clause, the court concluded that Kittery Retail did not have a "protectable property interest, and therefore, its due process claim must fail." Pet. App. at A-14 to A-15, ¶ 32. Because there was no protectable property interest, the Court did not reach the question whether "that deprivation was accomplished by 'means that were pretextual, arbitrary and capricious, and . . . without any rational basis."'" Pet. App. at A-14 to A-15, ¶ 32.

The court also rejected Kittery Retail's arguments on equitable estoppel, Pet. App. at A-15 to A-16, ¶¶ 33-36, and the Contracts Clause, Pet. App. at A-17 to A-20, ¶¶ 37-42.

REASONS FOR GRANTING THE WRIT

Kittery Retail Ventures, LLC; DSS Land Holdings, LLC; and Stephen A. Hynes respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Judicial Court of Maine.

I

THE STATE AND LOWER FEDERAL COURTS ARE IN GREAT DISARRAY ON THE QUESTION OF WHETHER RIGHTS UNDER THE DUE PROCESS CLAUSE ATTACH TO REGULATORY DEPRIVATIONS OF TRADITIONAL RIGHTS IN PROPERTY

The essential reason why Kittery Retail lost on its federal Due Process Claim is because the Maine Supreme Court found that the landowner had "no protectable property interest." Pet. App. at A-15, ¶ 32. In other words, no matter how arbitrary or capricious the Town's actions might have been in the denial of Kittery Retail's permit application, the resulting denial is not subject to due process review because Kittery Retail did not

have a vested interest in the permit.[2] That means that a local or state government is immune from Due Process considerations unless and until a permit is actually granted. In this case Kittery Retail lost its right to develop its shopping center when the applicable zoning was *retroactively* changed so that it could not build with a sufficient density and it could no longer acquire transferable development credits from other landowners within the mixed-use zone. But because it had not received a *vested* permit right, the Town is able to subject the landowner to an astonishingly arbitrary retroactive ordinance without fear of any judicial oversight under the Due Process Clause.

The question of what the requisite interest in property must be in order to be afforded the protections of the Due Process Clause is one that has vexed the commentators, state courts, and lower federal courts for decades. This problem is becoming quite important because state and local governments are increasingly withholding from landowners who are seeking permits a reasonable point where they can have a "vested" right to a particular land use. As a result, state and local governments often deny landowners the right to use their property for the most arbitrary and capricious of reasons. And yet because the owners lack a "vested" right to that permit, they are unable—in some jurisdictions—to obtain review of the government's actions under the Due Process Clause. In other jurisdictions, however, landowners can obtain judicial review under the Due Process Clause under the same facts because their land is in and of itself recognized as an important property interest. In other words, the level of review a landowner may obtain under the Due Process Clause will depend largely on the jurisdiction where the action is filed.

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[2] Kittery Retail concedes, for the sake of this petition, that it did not, under the property law of the State of Maine, have a vested right to the permit.

As will be shown next, the origins of this problem arise from a disquiet among some members of this Court over expansive applications of the Due Process Clause combined with a move to limit that clause's jurisprudence to more traditional and tangible rights. However, what the state and lower federal courts have done with these concerns is nothing short of chaotic. Some courts are now holding erroneously that there are no rights to due process until a landowner has a vested permit in hand; other courts adopt a more sensible rule that the ownership of real property itself can invoke the protections of the Due Process Clause if government wrongly denies the use of that property. It is now time, with the opportunity provided by this case, for this Court to harmonize the conflicting doctrines below and to do it in a way that does not threaten a perceived unwarranted expansion of substantive due process.

A. The Origins of the Disarray in the State and Lower Federal Courts

The federal circuits are utterly at odds with one another on the question of whether substantive due process review can attach in the land use permitting context. As the Sixth Circuit noted in 1992, "The lack of uniformity among the circuits in dealing with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992). As that court further lamented, "[w]e wish it were within our power to harmonize these decisions, but the conflicts among the circuits are too great. Harmony will have to await action by the Supreme Court." *Id.* at 1220. The passage of time has not helped. The substantial conflict between the state and lower federal courts is discussed in more detail in Part I.C., *infra*. However, in order to understand the enormity of this conflict, it is helpful to discuss first the doctrinal origins of the conflict. These origins lie in this Court's efforts to expand and later contract the scope of the doctrine of substantive due process.

Without belaboring the history of the application of the Due Process Clause, it is clear that there were at least three significant developments during the twentieth century:

1. The expansion and then retrenchment of substantive due process in the economic arena. *Compare Lochner v. People of the State of New York*, 198 U.S. 45 (1905), *with United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

2. The expansion of substantive due process into rights found in "penumbras, formed by emanations." *Griswold v. State of Connecticut*, 381 U.S. 479, 484 (1965).

3. The expansion of procedural due process as a means of securing access to governmental benefits or "entitlements" followed by the retrenchment of the definition of those entitlements. *Compare Goldberg v. Kelly*, 397 U.S. 254, 263 n.8 (1970), *with Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78 (1972).

It is the latter *Roth* retrenchment that is of concern in this case because the state and lower federal courts have expanded, with great inconsistency, *Roth's* limitation beyond the realm of entitlements and so-called "new" property. Instead some courts, to varying degrees, are applying the *Roth* limitation to "old" property rights, including the right to use real property.

The issue here originated with the ideas put forward by Charles Reich in the 1960's. In essence, Reich suggested that certain government entitlements can take on the patina of a constitutionally protected right. *See* Charles Reich, *The New Property*, 73 Yale L.J. 733 (1964); and Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245 (1965). Reich's advocacy came to the fore in 1970 when this Court decided *Goldberg v. Kelly*, 397 U.S. 254. In that case this Court held that a welfare recipient is entitled to a hearing before there can be a

termination of benefits. Quoting from Reich's articles, Justice Brennan, writing for the Court, said:

> It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. . . . . [T]o the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.

Goldberg v. Kelly, 397 U.S. at 263 n.8 (citations to Reich omitted).

Two years later, this Court put a limitation on the entitlement expansionism when it decided *Board of Regents v. Roth*, 408 U.S. 564 (1972), where this Court began by noting:

> Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a *benefit*, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a *legitimate claim of entitlement* to it.

Board of Regents of State Colleges v. Roth, 408 U.S. at 576 (emphasis added).

This Court finished by noting that Roth had no claim to entitlement for continued employment—in fact his contract eschewed any such understanding:

> In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University

> authorities to give him a hearing when they declined to renew his contract of employment.

Board of Regents, 408 U.S. at 578. In other words, for those "new property" rights, that is in the words of Charles Reich as quoted in *Goldberg*, those "rights that do not fall within traditional common-law concepts of property," this Court limited procedural due process inquiries to those rights that at least encompass a "legitimate claim of entitlement."

The reason for this shift presumably was to put limits on what would otherwise be a boundless expansion of judicial review of a constitutional stature of an unlimited number of government benefits and favors. It has also been suggested that there is also an element of *Roth* that attempts to add legitimacy to the "rights revolution" for which *Goldberg* stands. As Professor Merrill explains:

> *Roth's* disquisition on constitutional liberty and property is therefore best understood as an effort to secure the legitimacy of the due process revolution started by *Goldberg*. The Court's strategy was to make the revolution appear more law-like and hence less revolutionary than it actually was. This accounts for the Court's announcement that the Due Process Clause applies only to a limited range of entitlements that have discernible "boundaries," and for its tacit disclaimer of earlier suggestions that protected entitlements be identified based on a judicial assessment of whether the challenged action imposes a "grievous loss" or implicates "important interests."

Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 918-19 (2000).

In any event, from the humble beginnings of *Roth*, a case limited to nontraditional rights in the context of a procedural

due process case, the state and lower federal courts have embarked on a confusing and conflicting expansion of *Roth* into areas well beyond the facts or theory of that case. As will be seen in Part I.C. *infra*, a number of courts have taken to applying *Roth* in a way that prevents judicial review of land use decisions that allegedly involve violations of *substantive* due process solely because the landowner did not have the permit, or at least a vested right to the permit in question. In other words, before there can be analysis of whether the denial of a permit violates substantive due process, the landowner must have the denied permit in hand. That, of course, means that in some jurisdictions there can never be substantive due process review of a permit denial.

First, however, it is important to note that governmental land use decisions often do involve fundamental rights in property, and that this Court at one time applied substantive due process review to matters involving land use regulation.

B. The *Right* to Use and Develop Property Is Not a Government *Benefit*, It Is a Fundamental Right

Historically and in recent times, this Court has treated the right to use property as something more than an entitlement or benefit conferred by government. It has also applied both the protections of the Due Process Clause and the Takings Clause to property in land use disputes. For example, this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), noted that there is a *right* to put property to reasonable use: "[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'" *Nollan*, 483 U.S. at 833 n.2. Likewise, in *State of Washington ex rel. Seattle Title Trust Company v. Roberge*, 278 U.S. 116, 121 (1928), this Court noted that "[t]he *right* of the trustee to devote its land to any

legitimate use is property within the protection of the Constitution." (Emphasis added.) A century earlier, this Court in *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829), wrote that "[t]he fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred." The *Wilkinson* court also stressed "the *right* of the citizens to the free enjoyment of their property *lawfully* acquired." *Wilkinson*, 27 U.S. (2 Pet.) at 657-58 (emphasis added).

In *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926), a property owner challenged a local zoning ordinance on due process and equal protection grounds. This Court heard the arguments, despite the lack of any license or permit. Indeed, this Court specifically rejected Euclid's argument that the suit was premature because the landowner had not participated in the regulatory procedure set up for obtaining permission to use property in a particular way. *Id.* at 386. Because there was no license, permit, or classification the fundamental interest worthy of due process review could be only ownership of the property.[3]

This Court's history of treating the ability to use real property as a fundamental right makes the decisions of some state and lower courts not to provide substantive due process review to serious deprivations of that right quite troubling.

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[3] Of course, not all decisions involving real property necessarily invoke due process. There is a distinction between an outright denial based on the retroactive application of a new ordinance, as in the present case, and something akin to a mere delay in the receipt of a building permit as in *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 200 (2003) (Scalia, J., concurring). Moreover, in the present case, the retroactive application of the new zoning ordinance not only resulted in the denial of Kittery Retail's permit, but also the town's abolition of the "availability of transferred retail development rights." Pet. App. at A-3, ¶ 3.

C. The State and Lower Federal Courts Are in Disarray. Some, Especially the Second, Fourth, Eighth, Eleventh and to Some Degree the Sixth Circuits Hold That *Roth* Prevents Due Process Review When a Nonvested Right to a Permit Is Denied While Other Courts, Especially the First, Third, Seventh, and Ninth Circuits Find Due Process Applies Because the Ownership of Property Is a Fundamental Right

1. Some Courts Have Extended *Roth* to Old Property

One of the most cited cases in support of the extension of a *Roth* entitlement prerequisite for the application of due process protection to a land use is *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir. 1989). In that case the Second Circuit found that a litigant must show no discretion in issuance of a permit, or that issuance is "virtually assured" if under "narrowly circumscribed" discretion. Because of the frequency with which *RRI* is cited, it may be useful to set out its reasoning. According to the *RRI* court, before the courts began to focus on *Roth* entitlement issues they

> implicitly assumed that the pertinent property interest is the property the plaintiff owns and simply examined whether the action of local regulators in denying an application for the proposed use of the land was arbitrary and capricious. This has occurred both in decisions rejecting substantive due process challenges . . . and in the few decisions upholding such claims, at least against a motion for summary judgment.

870 F.2d at 916 (citations omitted). The *RRI* court then proceeded to adopt the requirement that a landowner have a

vested right to a permit before the government's action on the permit application can be subjected to a due process review. *RRI*, however, based its decision to apply the *Roth* limitation primarily on an older Second Circuit case, and admits:

> It is not readily apparent why land regulation cases that involve applications to local regulators have applied the *Roth* entitlement test to inquire whether an entitlement exists in what has been applied for—whether a zoning variance, a business license, or a building permit—instead of simply recognizing the owner's indisputable property interest in the land he owns and asking whether local government has exceeded the limits of substantive due process in regulating the plaintiff's use of his property by denying the application arbitrarily and capriciously.

870 F.2d at 917. In other words, the court is not particularly sure why it ought to apply the *Roth* limitation, but it does so anyway. The court continues by suggesting that the *Roth* analysis is often a surrogate for a due process analysis:

> Indeed, the entitlement inquiry will not often aid the analysis in this context. When a local regulator's discretionary decision to deny an application is not arbitrary or capricious, the plaintiff will usually be deemed not to have a sufficient entitlement to constitute a protected property interest.

870 F.2d at 918. This is, to say the least, not a ringing endorsement or compelling justification for limiting due process protections to those situations where a *Roth* entitlement to a permit exists.

The Fourth Circuit later expanded on this theme in *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992), where it provided something more of a justification for its adoption of the *Roth* limitation, excluding

from due process protections those situations where a governmental body retains significant discretion over the approval of a particular land use:

> Under this [*Roth* analysis] approach, whether a property-holder possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks *all* discretion to deny issuance of the permit or to withhold its approval. *Any significant discretion conferred upon the local agency defeats the claim of a property interest.*

969 F.2d at 68 (emphasis added).

Other courts have adopted the *Roth* limitation. The Eleventh Circuit in *Marine One, Inc. v. Manatee County*, 877 F.2d 892, 894-95 (11th Cir. 1989) (citing to *Roth)*, looked less at "discretion" and more to the question of whether a property owner had a "vested right" to permit:

> To prevail under 42 U.S.C.A. § 1983, plaintiffs must show that the action by the governmental body or governmental representative constitutes a violation of a federally protected right. Schmidt and Marine One claim that the County's action of revoking the building permit violated the Fifth Amendment prohibition against taking private property without just compensation and the Fourteenth Amendment requirement of substantive due process. The threshold determination, then, is whether plaintiffs have a property interest protected by the Constitution.
>
> . . . Florida law is clear that there is no property right in possession of the permit.

877 F.2d at 894. Similarly, the Eleventh Circuit also held in *Spence v. Zimmerman*, 873 F.2d 256, 261 (11th Cir. 1989):

> Because we conclude that the Spences had no protectible property interest in the TCO [temporary certificate of occupancy] and were never deprived of the building permit, we do not address the Spences' claim that they have been deprived of a property interest without procedural due process.

Id. at n.6. Finally, the Eleventh Circuit in *Villas of Lake Jackson, Ltd. v. Leon County,* 121 F.3rd 610, 614 (11th Cir. 1997), the primary case relied upon by the Maine Supreme Court in the present case, held that a landowner must show a "a state-created property right in the development project" before a due process analysis can be utilized.

The Eighth Circuit likewise follows the discretion model of *Roth* entitlement analysis. In *Bituminous Materials, Inc. v. Rice County, Minnesota,* 126 F.3d 1068, 1070 (8th Cir. 1997), the Court wrote:

> To prevail on a substantive due process claim, plaintiff must first establish "a protected property interest to which the Fourteenth Amendment's due process protection applies." *Ellis v. City of Yankton,* (8th Cir. 1995) . . . . A claim to entitlement arises, for these purposes, when a statute or regulation places substantial limits on the government's exercise of its licensing discretion. Thus, the holder of a land use permit has a property interest if a state law or regulation limits the issuing authority's discretion to restrict or revoke the permit by *requiring* that the permit issue upon compliance with terms and conditions prescribed by statute or ordinance.

126 F.3d at 1070.

The Sixth Circuit focuses its analysis not on the amount of discretion available to the regulating entity, but on the "right" to a zoning change:

> In order to have such a property interest supporting a substantive due process claim, Triomphe must show either that it possessed a legitimate claim of entitlement to the special use permit or a justifiable expectation that the City Council would issue the permit.

Triomphe Investors v. City of Northwood, 49 F.3d 198, 202 (6th Cir. 1995). But conversely, the Sixth Circuit previously wrote:

> This circuit has implicitly recognized that mere ownership of property subjected to zoning is a property interest sufficient to invoke due process.

Pearson v. City of Grand Blanc, 961 F.2d at 1218 n.29. In other words, the Sixth Circuit is not entirely harmonious on this issue.

In the Tenth Circuit, it is not clear what property entitlement is required for substantive due process analysis. In *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kansas*, 927 F.2d 1111, 1119 (10th Cir. 1991), the court wrote that "[a]uthority in this circuit is unclear on what interest is required to trigger substantive due process guarantees."

2. Other Courts Have Declined to Extend *Roth* to Old Property

The Ninth Circuit explained the *Roth* problem eloquently when it wrote:

> The State's reliance upon *Roth*, however, is misplaced. Understood in proper context, it is clear that *Roth* stands not for a theory of plenary state control over the definition and recognition of

> compensable property interests, as the State assumes, but for a much more modest proposition. *Roth* was a so-called "new property" case; in it, the Court considered the circumstances under which state law might serve to elevate certain nontraditional forms of property—such as public employment, welfare assistance, state contracts and licenses, and other government largesse—to constitutional status. The *Roth* Court's recognition of the unremarkable proposition that state law may affirmatively create constitutionally protected "new property" interests in no way implies that a State may by statute or regulation roll back or eliminate traditional "old property" rights . . . . Rather, there is, we think, a "core" notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny . . . . Were the rule otherwise, States could unilaterally dictate the content of—indeed, altogether opt out of—both the Takings Clause and the Due Process Clause simply by statutorily recharacterizing traditional property-law concepts.

Schneider v. California Dep't of Corrections, 151 F.3d 1194, 1200-01 (9th Cir. 1998) (footnotes omitted).

In *DeBlasio v. Zoning Board of Adjustment for Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995), *cert. denied*, 516 U.S. 937 (1995), *overruled on other grounds by United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003), a landowner challenged the Township's determination that his use of his property was in violation of a zoning ordinance. The Town argued that DeBlasio had no property interest in a favorable zoning decision, and therefore

his due process rights were not implicated. The Third Circuit disagreed, holding:

> [O]wnership is a property interest worthy of substantive due process protection. Indeed, *one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership*. Thus, in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached. Where the plaintiff so alleges, the plaintiff has, as a matter of law, impliedly established possession of a property interest worthy of substantive due process protection.

53 F.3d at 600-01 (citations and footnotes omitted) (emphasis added).[4]

Writing for the Seventh Circuit, in *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994), Judge Easterbrook explained:

> River Park may well have lacked a property interest in one classification rather than another. But it surely had a property interest in the land, which it owned in fee simple, and it is therefore entitled to contend that the City's regulation of that land deprived it of property without due process . . . . An owner may build on its land; that is an ordinary

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[4] For support of the *DeBlasio* approach, *see* Stewart M. Wiener, *Comment: Substantive Due Process in the Twilight Zone: Protecting Property Interests from Arbitrary Land Use Decisions*, 69 Temp. L. Rev. 1467 (1996).

> element of a property interest. Zoning classifications are not the measure of the property interest but are legal restrictions on the use of property.

23 F.3d at 165-66.

The First Circuit plies a middle ground, holding that Due Process protections are generally not available in ordinary zoning disputes, but may attach when the government action is truly horrendous:

> We have consistently rejected substantive due process claims arising out of disputes between developers and land planning authorities while leaving the door "slightly ajar" for "truly horrendous situations." *Néstor Colón Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir. 1992) . . . . On the substantive due process element, it is true that we have left the door open in truly horrendous situations.

Macone v. Town of Wakefield, 277 F.3d 1, 9 (1st Cir. 2002).

3. The State Courts Are Also in Conflict

As noted, in the present case the Maine Supreme Court refused to consider the due process allegations of the landowner because Kittery Retail did not have a vested right to the permit it was denied by retroactive application of the new ordinance. Pet. App. at A-14 to A-15, ¶ 32.

In contrast, the Washington Supreme Court has held that a property interest that is inadequate for a takings analysis may be adequate for a substantive federal due process analysis: *Sintra, Inc. v. City of Seattle*, 829 P.2d 765, 771 (Wash. 1992). ("If no fundamental attribute of property is implicated, and the regulation protects the public from a permissible harm, then a constitutional taking does not exist, but a substantive due process claim may still be available.")

D. There Is Much Academic Criticism of the Inconsistent Utilization of the *Roth* Paradigm

Academic scholars are adamant in expressing dismay over both the inconsistency in the state and lower federal courts, and the suggestion that the *Roth* entitlement theory should be used so cavalierly to deny due process rights. For example, Professor Mandelker writes:

> Whether the Court would apply the entitlement rule to substantive due process claims brought by landowners is not clear. Opinions by the Court and individual Justices point in both directions, and the lower federal courts also disagree on whether substantive and procedural due process are equivalent.

Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 Wash. U. J. L. & Pol'y 61, 81-82 (2000).

Professor Merrill writes in relation to the *Roth* requirement of first defining property interests before applying due process or takings analyses that how to do this is "unclear":

> Parties seeking to protect an economic interest under the Due Process or Takings Clauses, whether advancing a procedural or a substantive claim, must be prepared to demonstrate that their interest is "property." Yet how to do this remains unclear.

Thomas J. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. at 889.

In discussing the relation between discretion and constitutional protection from an abuse of that discretion, Brian Blaesser notes that

> [l]andowners and developers are learning from federal court decisions in some of the circuits that, as

> the *degree of discretion* that can be exercised . . . increases, the less likely it is that they will be deemed to have any "property interest" to protect, regardless of how arbitrarily that discretion is exercised in a particular case.

Brian W. Blaesser, *Substantive Due Process Protection at the Outer Margins of Municipal Behavior*, 3 Wash. U. J. L. & Pol'y 583, 585 (2000).

In criticizing the *Roth* limitations of the several circuit courts, Stewart Wiener suggests:

> If the courts use substantive due process to protect the full panoply of liberty and property rights secured by the Fourteenth Amendment, they can focus instead on a more appropriate inquiry. Rather than limiting the scope of protected rights, they may evaluate the appropriate level of arbitrary government conduct that triggers substantive due process protection.

Stewart M. Wiener, *supra* at 1492.

It is clear that there is a not only a substantial conflict among the state and lower federal courts, but that the academic community recognizes the conflict and calls for its resolution by this Court. If this Court grants this petition then it will have an opportunity to explain exactly what type of real property rights are protected by the Due Process Clause. That is, this Court can determine whether the right to use property is important enough to receive constitutional protection, or whether no due process protections attach until a permit is actually vested.

Kittery Retail is *not* asking this Court, however, for a determination of whether it actually had a vested right to a permit. It is not that an arbitrary "late vesting" rule (meaning that there is no vesting until very late in the permitting process or after the construction commences) is necessarily immune to

the strictures of the Due Process Clause, but simply that this is more often than not a matter for state law and not likely to be of interest to this Court. Nor is Kittery retail suggesting that this Court rule on the Contracts Clause claim raised below. While at least one federal trial court has ruled that a cause of action may lie against the Town of Kittery for the retroactive destruction of contract rights (a contract to purchase land and a contract to receive transferable retail development rights),[5] this petition is focused exclusively on the issue of whether Kittery Retail's distinct property interests warrant protection under the Due Process Clause. If Kittery Retail prevails, it expects to go back into the courts of Maine to demonstrate that it has suffered a violation of its substantive due process rights because the deprivation of its rights was accomplished by "'means that were pretextual, arbitrary and capricious, and . . . without any rational basis.'" Pet. App. at A-15, ¶ 32.

CONCLUSION

The petition for writ of certiorari should be granted. There is a serious conflict among the state and lower federal courts over the question of when there may be an adequate property interest to entertain a claim under the Due Process Clause. This case, involving the retroactive application of a zoning law that

[5] *JSS Realty Co., LLC v. Town of Kittery, Maine*, 177 F. Supp. 2d 64 (D. Me. 2001).

resulted in the denial of a retail project is an ideal vehicle forthis Court to resolve the conflict. For that reason, it is respectfully submitted that Kittery Retail's Petition for Writ of Certiorari be granted.

DATED: January, 2005.

Respectfully submitted,

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Appendix A–1

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court

Docket No. Yor-03-393
Argued: Nov. 5, 2003
Decided: May 11, 2004

KITTERY RETAIL VENTURES, LLC et al.

v.

TOWN OF KITTERY

William H. Dale (orally), Sally J. Daggett, Jensen Baird Gardner & Henry, Portland, Duncan A. McEachern, McEachern & Thornhill, Kittery, for defendant.

Robert S. Frank, Harvey & Frank, Portland, for amicus curie New England Legal Foundation.

Panel: SAUFLEY, C.J., and CLIFFORD, RUDMAN, DANA, ALEXANDER, CALKINS, and LEVY, JJ.

CLIFFORD, J.

[¶ 1] Kittery Retail Ventures, LLC, DSS Land Holdings, LLC, and Stephen A. Hynes (collectively KRV) appeal from the judgments of the Superior Court (York, *Fritzsche, J.*) entered in favor of the Town of Kittery on both counts of KRV's complaint. KRV contends that the Superior Court erred when, in an appeal KRV had brought pursuant to M.R. Civ. P. 80B, it affirmed the Kittery Planning Board's decision to apply the terms of the zoning ordinance amendment enacted in September of 2000 to deny KRV's permit application. KRV also contends that the court erred when it entered a summary judgment in

favor of the Town on Count II of KRV's complaint, seeking a declaratory judgment that the September amendment could not be applied against KRV. We affirm the judgments.

I. BACKGROUND

[¶ 2] In early 1999, KRV began negotiations with DSS Land Holdings, LLC, and Stephen A. Hynes, trustee of Real Property Trust Agreement, to purchase two parcels of adjoining land located close to Route 1 in Kittery. At that time, the land was located in a mixed-use district, and pursuant to the Town's zoning ordinance, up to thirty percent of the land could be applied to retail use, and the land was eligible for the transfer of retail development rights.[1] KRV's intent was to purchase the land and build Kittery Marketplace, a 250,000 square-foot retail outlet mall. In July 1999, KRV met with Kittery's town manager and town planner and presented preliminary sketches of the proposed development. On January 13, 2000, KRV filed a sketch plan with the Planning Board, and on March 23, 2000, KRV filed a site plan application and tendered its application fee. The Board requested additional information regarding KRV's application on April 13, April 27, and June 7, 2000.

[¶ 3] During this time period, there was activity in the Town regarding changes to mixed-use districts. The Town

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[1] According to section 16.12.130 of the zoning ordinance, the transfer of retail development rights allows for the development of a "few well-designed, multistore retail projects . . . rather than . . . a proliferation of individual retail stores on individual parcels." Kittery, Me., Land Use and Development Code Zoning Ordinance § 16.12.130(D)(9) (May 1998). One site is allowed to shift its future retail development potential to another site, thereby increasing the amount of retail development area on the receiving site. *Id.*

Council discussed the use of mixed-use districts and the transfer of retail development rights during several meetings between February and July 2000. On March 6, 2000, a proposed emergency ordinance to amend the mixed-use district and eliminate the availability of transferred retail development rights failed of passage at a Town Council meeting. On March 27, 2000, a citizen group filed a petition for a citizen vote on the enactment of an ordinance that would amend the mixed-use district provisions of the Town's zoning ordinance and eliminate the availability of transferred retail development rights.

[¶ 4] The citizen-proposed amendment to the zoning ordinance altering the requirements in the mixed-use district by reducing the retail coverage area from thirty to fifteen percent and eliminating the availability of transferred retail development rights was approved by the voters on June 13, 2000. Pursuant to the Kittery Town Charter, the effective date of the zoning ordinance amendment was July 14, 2000.

[¶ 5] After the June amendment was enacted, but before its effective date, KRV submitted a revised preliminary plan application to the Board, and on June 29, 2000, the town planner notified KRV that its application had met the submission requirements. On July 13, 2000, one month after the June ordinance was enacted, the Board voted unanimously to approve, as substantially complete, the site plan for the Kittery Marketplace and accepted the application for review. A public hearing regarding the Kittery Marketplace was held on August 23, 2000.

[¶ 6] On September 26, 2000, the voters approved another amendment to the zoning ordinance, which mirrored the language of the June zoning ordinance amendment, but added the following language:

> Notwithstanding the provisions of 1 M.R.S.A. § 302, and regardless of the date on which it is approved by the voters, this amendment shall be effective as of September 30, 1999, and shall govern any and all applications for permits or approvals required under the Land Use and Development Code of the Town of Kittery, Maine that were or have been pending before any officer, board, or agency of the Town of Kittery on or at any time after September 30, 1999.

On October 26, 2000, the town planner notified KRV that the September amendment would apply to KRV's proposed project. In response, KRV filed a complaint in Superior Court, requesting review of the Board's decision, a declaratory judgment, and injunctive relief. The Superior Court dismissed the complaint without prejudice, holding that the October 26, 2000 communication from the town planner to KRV did not constitute a final decision of the Board, and remanded the case back to the Board. The Board met on May 9, 2002, and formally denied KRV's development application on the basis that it did not comply with the zoning ordinance as amended by the September amendment.

[¶ 7] In response, KRV filed a two-count complaint in the Superior Court. In Count I, KRV alleged that the Board's decision was arbitrary, capricious, and unlawful, and requested Superior Court review pursuant to M.R. Civ. P. 80B. In Count II, KRV requested a declaratory judgment that the terms of the September amendment could not be applied to its application based on various legal and equitable principles.

[¶ 8] KRV filed a motion for a summary judgment on Count II, but pursued Count I through a hearing. Following that hearing, the Superior Court affirmed the Board's decision to apply the terms of the September zoning ordinance amendment

to KRV's application. The court also entered a summary judgment for the Town on Count II, the declaratory judgment action. KRV subsequently filed this appeal.

[¶ 9] KRV contends that the Superior Court erred when it concluded that: nothing in the Kittery Town Charter prohibits retroactive legislation; KRV did not acquire vested rights because it did not begin construction and no bad faith existed; the referendum did not violate due process because it furthers legitimate legislative purposes and is rational; the Town was not equitably estopped from applying the referendum because KRV did not prove reasonable reliance on the town planner's opinion or the silence of other Town officials; and the Town did not violate the Contract Clause of the Maine and United States Constitutions. We agree with KRV that a portion of the September amendment violates the Town Charter, but because the offending portion can be severed from the remainder of the amendment, and the remaining portion of the September amendment includes a retroactivity provision that validly applies to KRV's application, we affirm the judgments.[2]

II. DISCUSSION

A. The Town Charter

[¶ 10] The interpretation of an ordinance is a question of law and is reviewed de novo. *Brackett v. Town of Rangeley,*

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[2] KRV also appeals from the Superior Court's judgment entered on Count I of its complaint. KRV does not dispute the Board's conclusion that its application does not comply with the terms of the September amendment, but contends that the terms of the September amendment cannot be applied to its application. Because we conclude that the terms of the September amendment do apply to KRV's application, we affirm the Superior Court's affirmance of the Planning Board's denial of KRV's application in KRV's Rule 80B appeal.

2003 ME 109, ¶ 15, 831 A.2d 422, 427. When interpreting the terms of an ordinance, we look first to the plain meaning of the terms in an effort to give effect to the legislative intent. *Griffin v. Town of Dedham,* 2002 ME 105, ¶ 7, 799 A.2d 1239, 1242.

[¶ 11] At the outset, we make the distinction between when an ordinance or statute is retroactively *applied* and when an ordinance or statute becomes *effective.* An ordinance is retroactively *applied* "when *applied* so as to determine the legal significance of acts or events that occurred prior to its *effective* date." *Coates v. Me. Employment Sec. Comm'n,* 406 A.2d 94, 96 (Me.1979) (emphasis omitted in part) (quoting *State Comm'n on Human Relations v. Amecon Div. of Litton Sys., Inc.,* 278 Md. 120, 360 A.2d 1, 3-4 (1976)). We have regularly discussed ordinances and statutes that affected events that occurred prior to the ordinance or statute's effective date. *E.g., Portland Sand & Gravel, Inc. v. Town of Gray,* 663 A.2d 41, 42 (Me.1995); *Morgan-Leland v. Univ. of Me.,* 632 A.2d 748, 748 (Me.1993).

[¶ 12] When a statute becomes effective, however, is more of a procedural matter and is governed, for state statutes, by ME. CONST. art. IV, pt. 3, § 16.[3] The effective date of ordinances passed in Kittery is governed by section 2.14(3) of

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[3] Me. Const. art. IV, pt. 3, § 16 provides:

No Act or joint resolution of the Legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the Legislature, of either branch, or of any committee or officer thereof, or appropriate money therefor or for the payment of salaries fixed by law, shall take effect until 90 days after the recess of the session of the Legislature in which it was passed, unless in case of emergency, which with the facts constituting the emergency shall be expressed in the preamble of the Act, the Legislature shall, by a vote of 2/3 of all the members elected to each House, otherwise direct.

the Kittery Town Charter, which provides: "Except as otherwise provided in this charter, *every adopted ordinance shall become effective at the expiration of 30 days after adoption or at any later date specified therein.*"[4] Kittery, Me., Town Charter § 2.14(3) (1967) (emphasis added).

[¶ 13] Just as the Legislature does not violate Me. Const. art. IV, pt. 3, § 16 when it enacts statutes with retroactive applicability, *State v. L.V.I. Group,* 1997 ME 25, ¶¶ 1, 6, 690 A.2d 960, 962, 963 (upholding the retroactive application of an amendment to 26 M.R.S.A. § 625- B); *City of Portland v. Fisherman's Wharf Assocs. II,* 541 A.2d 160, 164 (Me.1988) (recognizing the Legislature's ability to enact statutes with retroactive application); *Opinion of the Justices,* 460 A.2d 1341, 1347 (Me.1982), the September amendment does not violate section 2.14(3) of the Town Charter simply because it *applies* retroactively.

[¶ 14] Nonetheless, the language in the September amendment goes further than the language in the typical retroactive ordinance or statute. For example, when it enacted 39-A M.R.S.A. § 224 (Supp.2003), the Legislature stated: "'This Act applies retroactively to benefit calculations made under the Maine Revised Statutes, former title 39, sections 55 and 55-A at any time after January 1, 1972, and applies notwithstanding any adverse order or decree.' "*Bernier v. Data Gen. Corp.,* 2002 ME 2, ¶ 15, 787 A.2d 144, 149 (quoting P.L. 2001, ch. 390, § 2). The Legislature stated its intent to apply section 224 retroactively, but did not adjust the effective date of the statute, which remained September 21, 2001. *Id.*

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[4] The Town does not contend that the September amendment was passed as an emergency ordinance; if it had been, it would have become "effective upon adoption or at such later time as it may specify." Kittery, Me., Town Charter § 2.15 (1967).

[¶ 15] The same can be said for 23 M.R.S.A. § 156 (1992 & Supp.2003), which reads: "Notwithstanding Title 1, section 302, this section applies to all actions and proceedings pending on September 14, 1979." By adding the retroactivity provision, the Legislature clearly expressed an intent for retroactive application without adjusting the effective date of the amendment.

[¶ 16] The language in the September amendment goes beyond the language in most retroactive ordinances or statutes because not only does it purport to apply retroactively by affecting the consequences of actions taken prior to its effective date, it explicitly purports to become *effective* retroactively. The text of the September amendment reads:

> Notwithstanding the provisions of 1 M.R.S.A. § 302, and regardless of the date on which it is approved by the voters, this amendment *shall be effective as of September 30, 1999,* and shall govern any and all applications for permits or approvals required under the Land Use and Development Code of the Town of Kittery, Maine that were or have been pending before any officer, board, or agency of the Town of Kittery on or at any time after September 30, 1999.
>
> (Emphasis added.)

[¶ 17] We have previously stated that town ordinances must conform to town charters; the relationship between the two is the same as the relationship between statutes and constitutions. *Farris ex rel. Anderson v. Colley,* 145 Me. 95, 99, 73 A.2d 37, 39 (1950) (quoting 5 MCQUILLAN, LAW OF MUNICIPAL CORPORATIONS § 15.19 (3d ed. 1949)). Because the September amendment becomes effective before "the expiration of 30 days after adoption or at any later date specified therein," it directly violates the Town Charter.

Accordingly, we conclude that the provision of the September amendment that establishes a retroactive effective date is void.

B. Severability

[¶ 18] An invalid portion of a statute or an ordinance will result in the entire statute or ordinance being void only when it is such an integral portion of the entire statute or ordinance that the enacting body would have only enacted the legislation as a whole. *Bayside Enters., Inc. v. Me. Agric. Bargaining Bd.*, 513 A.2d 1355, 1360 (Me.1986). There are two reasons why the portion of the September amendment that establishes a retroactive effective date may be severed from the remainder of the amendment. First, although the portion of the September amendment that establishes a retroactive effective date is void, Kittery's Land Use and Development Code Zoning Ordinance contains a severability provision, which reads:

> In the event that any section, subsection or any portion of this title shall be declared by any court of competent jurisdiction to be invalid for any reason, such decision shall not be deemed to affect the validity of any other section, subsection or other portion of this title; to this end, the provisions of this title are declared to be severable.

Kittery, Me., Land Use and Development Code Zoning Ordinance § 16.04.080 (May 1998). A provision such as section 16.04.080 is an indication that no portion of the ordinance is so integral that its invalidity must invalidate any other portion of the ordinance. *See Begin v. Town of Sabattus*, 409 A.2d 1269, 1274 (Me.1979).

[¶ 19] Second, the wording of the September amendment demonstrates that the retroactive paragraph serves two purposes. One purpose is to make the amendment's effective date retroactive; a separate and independent purpose

is to apply the amendment retroactively. If the portion of the amendment establishing retroactive applicability is valid and independent, it may stand. *Lambert v. Wentworth,* 423 A.2d 527, 535 (Me.1980).

[¶ 20] Generally, "[a]ctions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby." 1 M.R.S.A. § 302 (1989); *Riley v. Bath Iron Works Corp.,* 639 A.2d 626, 627 (Me.1994). Nevertheless, section 302 is a rule of statutory construction, and does not apply when there is clear and unequivocal language that the statute or ordinance applies to pending proceedings. *Riley,* 639 A.2d at 627.

[¶ 21] In this case, the September amendment contains clear and unequivocal language applying it to pending proceedings. *Bernier,* 2002 ME 2, ¶ 16, 787 A.2d at 150 ("Legislation expressly citing section 302, or explicitly stating an intent to apply a provision to pending proceedings, is sufficient to overcome the general rule of section 302."). The September amendment expressly cites section 302 and explicitly states an intent to apply the amendment to pending proceedings. Therefore, the portion of the amendment establishing retroactive application is valid, serves an independent purpose, and can be severed from the portion of the amendment establishing a retroactive effective date.

[¶ 22] There is no dispute that KRV did not have an application pending prior to September 30, 1999, nor does KRV challenge the Board's conclusion that KRV's application does not comply with the terms of the September amendment. Accordingly, we conclude that the September amendment, which became effective thirty days after it was adopted, pursuant to section 2.14(3) of the Town Charter, and retroactively applies to proceedings pending on or after

September 30, 1999, operates to require denial of KRV's application.

C. Equitably Acquired Vested Rights

[¶ 23] KRV contends that the September amendment cannot be retroactively applied to require denial of its application because there is evidence that the September amendment was enacted in bad faith and with the sole purpose of preventing KRV from continuing with its project. KRV contends that because of the existence of bad faith, KRV equitably acquired vested rights to pursue its development in accordance with the terms of the ordinance that existed when KRV filed its application.

[¶ 24] Generally, neither the submission of a development application, nor the issuance of a development permit, establishes vested rights. *Thomas v. Zoning Bd. of Appeals,* 381 A.2d 643, 647 (Me.1978). This is because "all property is held in subordination to the police power." *Id.* (quoting *R.A. Vachon & Son, Inc. v. City of Concord,* 112 N.H. 107, 289 A.2d 646, 648 (1972)). Although a party may acquire vested rights as a result of equitable considerations, mere reliance on the language of an existing ordinance, or the incurrence of preliminary expenses to satisfy application requirements, is not sufficient to establish vested rights. *Sahl v. Town of York,* 2000 ME 180, ¶ 13, 760 A.2d 266, 270. We have recognized, however, that "bad faith or discriminatory enactment of a zoning ordinance for the purpose of preventing a legal use by the applicant may confer vested rights on the applicant." *Thomas,* 381 A.2d at 647.

[¶ 25] Although we have recognized that a party may equitably acquire vested rights, parties have had difficulty in proving the requisite bad faith or discriminatory enactment. In *Waste Disposal Inc. v. Town of Porter*, the plaintiff filed an

application to construct a solid waste disposal facility. 563 A.2d 779, 779 (Me.1989). After Waste Disposal filed its application, the Town voters enacted a moratorium in direct response to Waste Disposal's plan. *Id.* at 780 & n. 2. There was evidence that the moratorium was necessary because there was an absence of rules governing landfills. *Id.* at 780 n. 2. While the moratorium was in effect, the Town amended the land use ordinance, and later, enacted a solid waste ordinance. *Id.* at 781 n. 4. We found that Waste Disposal failed to demonstrate that the Town acted in bad faith when it enacted the moratorium and subsequent amendments to the town ordinance. *Id.* at 782.

[¶ 26] In *Fisherman's Wharf Assocs. II*, we held that Fisherman's Wharf Associates failed to prove bad faith or discriminatory enactment when it filed its permit application two months after the proposed ordinance amendment had been filed. 541 A.2d at 161, 164. Similarly, there was no indication of bad faith in *Thomas,* when the Bangor Planning Department had been working on a new ordinance far before Thomas filed his permit application. 381 A.2d at 644, 647. The new ordinance was a complete revision of the prior ordinance and was plainly not directed at Thomas's application. *Id.* at 647.

[¶ 27] Although a party may equitably acquire vested rights by showing bad faith or discriminatory enactment, the surrounding circumstances must be more severe than the circumstances presented in this case. Because KRV is requesting an equitable remedy, its knowledge of the situation must be taken into account. *See Thomas v. Fales,* 577 A.2d 1181, 1183 (Me.1990). In this case, there is evidence that discussions regarding the mixed-use districts started taking place during Town Council meetings shortly after KRV filed its sketch plan and before it filed its plan application. Although KRV filed its application before the petition to enact the June ordinance amendment was filed, the petition was filed almost

two months before KRV entered into its purchase and sale agreement with Hynes. The petition had been filed weeks before KRV contends that it made substantive changes to its plan in order to comply with requests from the Board. KRV also had actual notice of the pending amendment when the attorney for the citizen group advised KRV of the proposed changes in May.

[¶ 28] In addition to considering KRV's knowledge of the pending amendment and opposition to the development, we also consider the lack of evidence of bad faith on the part of the town officials. This is not a case in which every time the developers complied with a request, town officials "hastily erected barriers." *Commercial Props., Inc. v. Peternel,* 418 Pa. 304, 211 A.2d 514, 519 (1965). In *Commercial Properties,* the Pennsylvania Supreme Court concluded that the rezoning ordinance did not apply against the plaintiffs because it was special legislation, aimed at the plaintiff's property, and there was evidence that while the plaintiffs attempted to secure a grading permit so that they could obtain a building permit, the township officials changed the law so that a building permit was required in order to obtain a grading permit. *Id.* at 518-19.

[¶ 29] Similarly, in *United States Cellular Corp. v. Bd. of Adjustment,* the Iowa Supreme Court found bad faith when the Board denied the plaintiff's application without any legal justification, and the resulting delay provided the Board with time to enact a new ordinance that prohibited the requested use. 589 N.W.2d 712, 719 (Iowa 1999). Likewise, in *State ex rel. Humble Oil & Refining Co. v. Wahner,* the Wisconsin Supreme Court found that equitable considerations prevented the Town of Allouez from applying an amended zoning ordinance when the plaintiff's application was repeatedly denied, and one month after the plaintiff commenced certiorari and mandamus proceedings, the Town amended the zoning ordinance so as to

prohibit the plaintiff's requested use of the area. 25 Wis.2d 1, 130 N.W.2d 304, 311-12 (1964).

[¶ 30] Finally, in *Whitehead Oil Co. v. City of Lincoln,* the planning commission delayed approving the plaintiff's permit until the city council changed the parcel's zoning designation so as not to allow the requested use. 515 N.W.2d 390, 395-96 (Neb.1994). The Nebraska Supreme Court held that the City acted arbitrarily and capriciously and held that the zoning change did not promote the general welfare, but was simply a reaction to the concerns of the citizens. *Id.* at 400. The court noted that "the neighborhood association's express objective to prevent the construction of a convenience store should not be imputed to the city," but disapproved the delay on the part of city officials "so as to allow the change of zoning request to 'catch up' with the use permit such that the two could be considered in conjunction with each other." *Id.*

[¶ 31] There is no evidence that the Kittery Planning Board engaged in delaying tactics, nor is there other evidence of bad faith on the part of any town official. *See Commercial Props.,* 211 A.2d at 518-19; *United States Cellular Corp.,* 589 N.W.2d at 719; *Humble Oil & Refining,* 130 N.W.2d at 311; *Whitehead Oil,* 515 N.W.2d at 400. That fact, in conjunction with KRV's knowledge of the pending ordinance changes, leads us to conclude that this is not the case in which equity demands that KRV acquire vested rights.

D. Due Process

[¶ 32] KRV also contends that the September amendment violates the Due Process Clauses[5] because the

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[5] "No person shall be deprived of life, liberty or property without due process of law ...." Me. Const. art. 1, § 6-A. "[N]or

(continued...)

retroactivity provision does not serve a legitimate government interest; its sole purpose is to target and defeat a particular project. In analyzing a due process claim that involves the deprivation of a property interest, courts must first determine whether the plaintiff was deprived of a protectable property interest, and second, whether that deprivation was accomplished by "'means that were pretextual, arbitrary and capricious, and . . . without any rational basis.'" *Reserve, Ltd. v. Town of Longboat Key,* 17 F.3d 1374, 1379 (11th Cir.1994) (quoting *Hearn v. City of Gainesville,* 688 F.2d 1328, 1332 (11th Cir.1982)). Vested rights may "constitute property subject to the arbitrary and capricious substantive due process protections." *Villas of Lake Jackson, Ltd. v. Leon County,* 121 F.3d 610, 614 (11th Cir.1997). KRV cannot contend that it legally acquired vested rights because it did not begin construction. *Sahl,* 2000 ME 180, ¶¶ 12-13, 760 A.2d at 269-70. Because we have concluded that KRV did not equitably acquire vested rights, KRV does not have a protectable property interest, and therefore, its due process claim must fail. *Reserve, Ltd.,* 17 F.3d at 1379.

E. Equitable Estoppel

[¶ 33] KRV also contends that the Town is equitably estopped from applying the September amendment to its project because the town planner made representations that KRV's application would be safe from any changes to the zoning ordinance and because the Board worked into the night on July 13, 2000, in order to complete the final review of KRV's application before the June amendment came into effect on July 14, 2000. KRV contends that it reasonably relied on the

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[5] (...continued)
shall any State deprive any person of life, liberty, or property, without due process of law . . . " U.S. Const. amend. XIV, § 1.

representations of the town planner and the actions of the Board when it expended resources in furtherance of its project.

[¶ 34] When reviewing an equitable estoppel claim, we review the totality of the circumstances, "including the nature of the government official or agency whose actions provide the basis for the claim and the governmental function being discharged by that official or agency." *F.S. Plummer Co. v. Town of Cape Elizabeth,* 612 A.2d 856, 860 (Me.1992). KRV must prove that (1) the statements or conduct of the town planner or Board induced KRV to act; (2) the reliance was detrimental; and (3) the reliance was reasonable. *Id.* Moreover, because it seeks to estop the enforcement of a zoning ordinance, and "[f]orceful policy reasons militate against restricting the enforcement of municipal zoning ordinances," KRV bears a greater burden. *City of Auburn v. Desgrosseilliers,* 578 A.2d 712, 715 (Me.1990).

[¶ 35] The facts, even when construed in the light most favorable to KRV, do not support an equitable estoppel claim. First, the Board did not make any misleading statements to KRV. The Board never assured KRV that its project was safe from amendments to the zoning ordinance. It never determined that the application met any of the zoning ordinance's substantive requirements; it only determined that the application met the submission requirements for a complete application. Even if the Board undertook its late-night review with the purpose of insulating KRV's project from the June amendment, it did not purport to insulate the project from subsequent amendments.

[¶ 36] Second, although KRV contends that the Town's silence was misleading, there is evidence that the Town was not silent; shortly after the September amendment was passed, the town planner notified KRV that the amendment would apply to its project. Finally, even if the statements made by the town

planner did induce KRV to act in detrimental reliance, thereby satisfying the first two elements, the reliance was not reasonable. In *F.S. Plummer,* we noted that "[r]eliance on oral unauthorized representations of a municipal official, where a written building permit is required for a project, is unreasonable as a matter of law." 612 A.2d at 861. The town planner was not authorized to insulate KRV's project from amendments to the zoning ordinance. The planner was not even authorized to formally accept KRV's application for review. Therefore, KRV's equitable estoppel claim also must fail.

F. Contract Clause

[¶ 37] Finally, KRV contends that the September amendment violates the Contract Clauses of the Maine and United States Constitutions[6] because (1) there were pre-existing contracts between KRV and DSS Land Holdings, LLC, and between KRV and Hynes; (2) the September amendment impaired those relationships because it changed the permitted use of the land at issue; and (3) the impairment was substantial because DSS Land Holdings, LLC and Hynes lose the value of the land sales (a combined $10.2 million) and KRV loses the value of the profits that would have been gained from the proposed project. KRV further contends that there was no "important public purpose" to the September amendment because its sole purpose was to target KRV's project.

[¶ 38] The threshold inquiry when analyzing a Contract Clause claim is whether the legislation resulted in a "'substantial impairment of a contractual relationship.' "Gen.

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[6] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . " U.S. CONST. art. I, § 10, cl. 1. "The Legislature shall pass no . . . law impairing the obligation of contracts . . . " Me. Const. art. I, § 11.

Motors Corp. v. Romein, 503 U.S. 181, 186, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992) (quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978)). There are three parts to this analysis: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Id.* The "[t]otal destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves Group, Inc. v. Kan. Power & Light Co.,* 459 U.S. 400, 411, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983). If there has been a substantial impairment, then the inquiry becomes whether the impairment is justified as "reasonable and necessary to serve an important public purpose." *United States Trust Co. v. New Jersey,* 431 U.S. 1, 25, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). Finally, the adjustment of the parties' contractual rights and responsibilities "must be [based] upon reasonable conditions" and be "of a character appropriate" to the purpose of the legislation. *Id.* at 22, 97 S.Ct. 1505. Unless the State, or in this case the municipality, is a contracting party, courts will defer to the judgment of the Legislature regarding necessity and reasonableness. *Energy Reserves Group,* 459 U.S. at 412-13, 103 S.Ct. 697.

[¶ 39] The Town concedes that there were existing contracts and that the September amendment impaired those contractual relationships. There are three reasons, however, why KRV's contractual relationships were not substantially impaired. First, when considering whether a party's contractual relationships were substantially impaired, courts focus on whether the subject matter of the contract is heavily regulated. *N.A. Burkitt, Inc. v. J.I. Case Co.,* 597 F.Supp. 1086, 1091 (D.Me.1984). When regulation already exists, it is foreseeable that changes in the law may alter contractual obligations. *Energy Reserves Group,* 459 U.S. at 416, 103 S.Ct. 697. As Justice Holmes stated, "One whose rights, such as they are, are

subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter." *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 357, 28 S.Ct. 529, 52 L.Ed. 828 (1908); *see also N.A. Burkitt, Inc.,* 597 F.Supp. at 1092 (holding that a statutory amendment did not violate the Contract Clause when it did not alter the ability of a party to terminate an agreement, but merely changed the procedure, and the parties were already subject to regulation when they entered into their agreement). In Maine, land use is an area that has traditionally been regulated by the state and municipalities. *See* 30-A M.R.S.A. §§ 4301-4457 (1996 & Supp.2003) (planning and land use regulations); *id.* §§ 4323, 4352 (providing municipalities with authority to develop growth management programs and zoning ordinances).

[¶ 40] Second, KRV's contracts with DSS Land Holdings, LLC and Hynes demonstrate that the parties contemplated that KRV might not be able to obtain all necessary permits and approvals. If KRV could not obtain the necessary permits and approvals, the closings would not occur. Similar situations were present in *Energy Reserves Group* and in *KHK Assocs. v. Dep't of Human Servs.,* 632 A.2d 138 (Me.1993). In *Energy Reserves Group,* the United States Supreme Court held that the reasonable expectations of the parties were not impaired when their contracts were structured in a manner that recognized that the regulation of gas prices might affect contractual obligations. 459 U.S. at 415-16, 103 S.Ct. 697. In *KHK Assocs.,* we held that the Contract Clause was not violated when the lease between the Department of Human Services and KHK Associates was subject to legislative appropriation and the Legislature did not appropriate funds for the lease. 632 A.2d at 141.

[¶ 41] Finally, KRV does not contend that the September amendment changed its rights or obligations; it only

contends that the amendment reduced the property values and resulted in lost profits.[7] Substantial impairment does not occur when a change in law does not affect the express terms of the contract or the obligations of the parties, but only affects the underlying subject matter of the contract. *Northwestern Nat'l Life Ins. Co. v. Tahoe Reg'l Planning Agency,* 632 F.2d 104, 106-07 (9th Cir.1980) (holding that a comprehensive land use ordinance did not violate the Contract Clause when it reduced the value of assessed lands and deterred payment of underlying assessments); *Schenck v. City of Hudson,* 997 F.Supp. 902, 907-08 (N.D.Ohio 1998) (holding that a growth ordinance did not violate the Contract Clause because it did not directly affect the parties' contracts, but incidentally impaired them), *aff'd,* 208 F.3d 215 (6th Cir.2000).

[¶ 42] Land use was a regulated field when KRV entered into the contracts, the contract language makes clear that KRV knew of those regulations, and the amendment affected only the underlying subject matter of the contracts. Accordingly, KRV's Contract Clause claim also fails. As a result, the September amendment operates to require denial of KRV's application.

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[7] KRV cites *Portland Sav. Bank v. Landry,* 372 A.2d 573, 576 (Me.1977) for the proposition that "where a statute lessens the value of a contract to the parties, the constitutional prohibition has been violated." Although portions of *Portland Sav. Bank* remain good law and we have not explicitly overturned our decision, *Portland Sav. Bank* was written before the United States Supreme Court's decision in *Energy Reserves Group,* and *Energy Reserves Group* substantially changed Contract Clause analysis. *United States v. Belanger,* 598 F.Supp. 598, 604 n. 4 (D.Me.1984) (stating that the Contract Clause analysis in *Portland Sav. Bank* is no longer in force due to *Energy Reserves Group*).

The entry is:

Judgments affirmed.

Appendix B–1

STATE OF MAINE

SUPREME JUDICIAL COURT Docket No. Yor-03-393
Sitting as the Law Court Decision No. 2004 ME 65

KITTERY RETAIL
VENTURES, LLC et al.

v. ORDER

TOWN OF KITTERY

Upon motion of Kittery Retail Ventures, LLC for reconsideration, it is ORDERED that the motion be, and hereby is, DENIED.

Dated: August 12, 2004

For the Court,

/s/ Robert W. Clifford
Robert W. Clifford, Associate Justice

Appendix C–1

SUPERIOR COURT OF MAINE

Filed May 29, 2003

Docket No. Civ.A. CV-02-162

KITTERY RETAIL
VENTURES, LLC et al.

v. ORDER AND DECISION

TOWN OF KITTERY

FRITZSCHE, J.

This case tests when persistence will be rewarded versus when it is too late to change the rules.

A plaintiff, Kittery Retail Ventures, LLC., entered into an option agreement to purchase land from the plaintiffs DDS Land Holdings, LLC and Stephen Hynes. This Kittery real estate was in the Mixed Use District as defined by the Kittery Land Use Ordinance. The developers proposed a 250,000 more or less square foot retail outlet mall on the property site along with the relocation of a nursing home and mobile home park. When the development was first proposed in 1999 it was permitted under the then existing provisions for the Mixed Use District.

As the proposal slowly worked its way through the review process before the Kittery Planning Board opposition from the general public grew. Requests to amend the zoning requirements to only permit less intensive uses in the District were presented to the

Town Council and failed. Having no success before the Town Council, the legislative body for the Town of Kittery, the opponents of this project and a similar project, decided to go directly to the voters through the Town's initiative and referendum process.

On June 13, 2000 the people of Kittery passed a referendum reducing the buildable area for retail in the district and eliminating a provision called "transfer of development rights." This referendum contained no retroactive language and pursuant to the Kittery Charter would not be effective for 30 days.

By the time of the effective date of the June 13, 2000 enactment the development proposal may have received "substantive review" as that term is used and defined in 1 M.R.S.A. § 302 so as to be unaffected by the new ordinance. If the definition of "substantive review" contained in 1 M.R.S.A. § 302 cannot be modified, in this case at a municipal level, then the opponents might be too late and the development would have to be reviewed based on the initial ordinance, which was more favorable to the developers. If "substantive review" could be defined in other ways then persistence might yet pay off.

On September 28, 2000 another election was held and an ordinance approved which purported to make the June 13, 2000 referendum retroactive to September 20, 1999. If that referendum is valid then "substantive review" as defined under 1 M.R.S.A. § 302 would not have taken place prior to the referendum's effective date of September 20, 1999. Newer less favorable conditions would be placed on the developers causing them presumably to abandon the project as no longer financially feasible.

Eventually, after an earlier suit in this Court and remand, the Planning Board determined that the September 28, 2000

referendum was valid and that the developer's proposal would be governed by the more restrictive less appealing zoning requirements.

The plaintiffs have filed a two count complaint containing a request for review pursuant to Rule 80B, M.R.Civ.P. (Count I) and a declaratory judgment action (Count II). Count I has been briefed and argued in the normal fashion and Count II is ready for review upon the plaintiffs' motion for summary judgment with its briefs and arguments.

This case presents important issues of statutory interpretation, persistence and timing and fairness in changing government requirements. It also raises related issues, which will not be answered, regarding democracy, local control and business development.

The key statutory provision is 1 M.R.S.A. § 302. While titles are not part of the statute itself, 1 M.R.S.A. § 302 is telling entitled "Construction and effect of repealing and amending Acts." This statute reads in full as follows:

> The repeal of an Act, resolve or municipal ordinance passed after the 4th day of March, 1870 does not revive any statute or ordinance in force before the Act, resolve or ordinance took effect. The repeal or amendment of an Act or ordinance does not affect any punishment, penalty or forfeiture incurred before the repeal or amendment takes effect, or any action or proceeding pending at the time of the repeal or amendment, for an offense committed or for recovery of a penalty or forfeiture incurred under the Act or ordinance repealed or amended. Actions or proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby. For the

> purposes of this section, a proceeding shall include but not be limited to petitions or applications for licenses or permits required by law at the time of their filing. For the purposes of this section and regardless of any other action taken by the reviewing authority, an application for a license or permit required by law as the time of its filing shall be considered to be a pending proceeding when the reviewing authority has conducted at least one substantive review of the application and not before. For the purposes of this section, a substantive review of an application for a license or permit required by law at the time of application shall consist of a review of that application to determine whether it complies with the review criteria and other applicable requirements of law.

In a case that received little notice in the zoning and land development arenas the Law Court in *Bank of Maine, N.A. v. Weisberger,* 477 A.2d 741, 6 (Me.1984), in a case involving in part attorney's fees in foreclosures, referred to 1 M.R.S.A. § 302 as "A standing rule of statutory construction."

In 1988 the Law Court decided a case that was noticed. In *City of Portland v. Fisherman's Wharf Associates, II,* 541 A.2d 160, 164 (Me.1988) it concluded in the context of the enactment of a zoning provision with a retroactive feature, that ". . . . section 302 does not expressly or impliedly prohibit municipalities from applying ordinances retroactively." Therefore an amended ordinance could reach back and defeat a project that had met all of the requirements that existed at the time it sought its permit and reverse the approval that had issued shortly before the referendum vote.

In a more recent Law Court case, *Smith v. Town of Pittston,* 2003 ME 46, ¶¶ 32-35 the Court affirmed that section 302 is a rule of statutory construction and that ordinances could be enacted with a retroactive provision.

The Town's decision to apply the amended ordinance retroactively while very difficult on developers is within its powers. Since 1 M.R .S.A. § 302 is only a rule of statutory construction a town may use alternatives other than the standard default provisions found in Section 302. The section essentially means that unless a statute, ordinance or other law says otherwise then Section 302 will dictate how the transition to the new law will be accomplished. The Town has chosen to vary from the default provision of Section 302 in two ways. The first is that the September 28, 2000 referendum was retroactive. The second is that the Town defined "substantive review" as a review "which commences at the first public hearing for an application held by the planning board." Section 16.16.020 of the Kittery Zoning Ordinance. Thus the first ordinance of June 13, 2000 would have taken effect on July 14, 2000 before the public hearing of August 23, 2000.

Section 302 is only a rule of statutory construction. Absent language to the contrary "pending" proceedings are not affected by the passage of an ordinance. If "pending" proceedings can be affected by a retroactivity provision in a local ordinance I do not see why the definition of "pending" cannot be other than the one provided in Section 302. "Pending" is tied to "substantive review" and "substantive review" is defined as "a review of that application to determine whether it complies with the review criteria and other applicable requirements of law." Other definitions are permissible.

Since the Town is free to use other rules of statutory construction other than those found in 1 M.R.S.A. § 302, judgment will enter for the defendant on Count I.

In Count II of its complaint the defendants have challenged the Town's action on multiple theories.

The Kittery Town Charter states that adopted non-emergency ordinances become effective 30 days after adoption or at any later date specified therein. Section 2.14(3) and 2.15. There is, however, no implied legislative prohibition and there is nothing in the Kittery Charter, which prohibits retroactive ordinances. *Fisherman's Wharf Associates, II,* at 164.

The plaintiffs' next claim that they acquired vested rights. While the developer spent a substantial sum in the proceedings before the Planning Board its project was never approved, permits were never granted and construction never began. Vested rights did not exist and were not interfered with. *Sahl v. Town of York,* 2000 ME 180, ¶ 12, 760 A.2d 266, 269. No bad faith exists, which might allow the vested rights doctrine to be invoked, when persistent local citizens consistently oppose large-scale retail developments and finally win. Their opposition and tenacity were apparent. It is not the case where town officials at the very last minute find that they have a proposal that they do not like and no legal means to stop it and enact a desperate targeted measure to derail without warning a near to approval proposal.

The plaintiffs have additionally argued that the retroactive ordinance violates due process. The ordinance is permissible because it furthers legitimate legislative purposes of regulating development and it does so by a rational means.

Likewise the next claim based on equitable estoppel fails, as there can be no justifiable reliance on the opinions of a town planner or the silence of other town officials particularly in light of the ongoing opposition. As no other arguments of the plaintiffs are persuasive, judgment will enter for the defendant on Count II.

Appendix C–7

The actions of the Town of Kittery are legal despite initially appearing to be unfair. Whether they are wise is not the question before the Court. The entry is:

Judgment for the defendant on the complaint.

Appendix D–1

SUPERIOR COURT OF MAINE

Filed April 4, 2002

Docket No. Civ.A. AP-00-103

KITTERY RETAIL
VENTURES, LLC et al.

v.

TOWN OF KITTERY

Durward W. Parkinson, Esq.--(PL) (Kittery Retail Ventures LLC).

U. Charles Remmel, Esq.--PL (DDS Land Holdings LLC).

Harold Friedman, Esq.--PL (Stephen A. Hynes).

William H. Dale, Esq.--DEF.

Duncan A. McEachern, Esq.--DEF.

ORDER AND DECISION

FRITZSCHE, Justice.

Kittery Retail Ventures, LLC has an option agreement to purchase land in the Kittery Mixed Use District near Route 1. It has proposed to develop a large retail outlet mall of some 250,000 square feet. That proposal has, not surprisingly, been controversial. A detailed history of the proposed project, the proceedings before

the Kittery Planning Board and the changes in municipal ordinances is not currently necessary.

In brief, in 1999 representatives of the developer met with town officials to present a preliminary proposal. That was followed by a series of meetings and other proceedings with the Planning Board from April of 2000 through July of 2000.

On June 13, 2000 the Town enacted a referendum changing relevant zoning requirements in the Mixed Use District. Those changes, which had no retroactive provisions, became effective 30 days later pursuant to the provisions of the Kittery Town Charter. On September 28, 2000 the Town approved a second referendum making the June 13, 2000 provisions retroactive to September 20, 1999. The plaintiffs, who include the land owners, have filed a three count complaint against the Town. The first count seeks review of the September 28, 2000 referendum pursuant to the procedures found at Rule 80B, M.R.Civ.P. Count II seeks a declaratory judgment that the same referendum is unconstitutional and Count III seeks an injunction prohibiting enforcement of the referendum. An agreed to procedural order was signed on January 29, 2001 establishing how the various counts would proceed.

To date the Planning Board has never granted or denied Kittery Retail Ventures any requested permit. It was assumed that the Board would find that either or both of the referenda are valid and apply to this proposal and that such a decision would result in the denial of approval for the project as proposed. It was then assumed that the developer would abandon its project rather than proceed with a substantially smaller project.

The first issue is whether this case is ready to be decided or whether the Planning Board needs to make a decision first. After reviewing several decisions from the Maine Supreme Judicial Court,

particularly *Rockland Plaza Realty v. City of Rockland,* 2001 ME 81, 772 A.2d 256, I have concluded, that since the Kittery Planning Board has not made a decision, that the Superior Court has nothing to review.

Rockland Plaza at ¶ 6, in a case permitting review, noted that, "Generally, final action by an administrative body is required before a party can appeal that action." The Rockland decision is based in part on some unique provisions of the Rockland Zoning Ordinance and the relationship of two different Rockland municipal bodies, the Planning Commission and the Zoning Board of Appeals. More importantly *Rockland Plaza,* at ¶ 6 on page 259, stated that all substantive decisions had already been made and all that needed to be done was " . . . the ministerial act of issuing an order of final approval of the plan."

In our case the applicant may or may not have met all of the other requirements needed for approval putting aside the two referenda. The Planning Board might decide that these referenda, despite their popular support and presumably well intentioned proponents, cannot legally block the proposed outlet mall. There exist serious concerns whether the proposal had advanced sufficiently so that neither referenda, for different reasons, can effect it. It should not be assumed that, on further reflection, the Board, even though the Town has presumably asked its attorneys to attempt to defend the ordinances, will automatically find them to be valid or applicable.

A reading of the dissenting opinion in *Rockland Plaza* also raises significant issues whether an opinion at this time would be an advisory opinion that cannot be given by the Superior Court. The dissent in *Plaza Realty* has succinctly stated the opinion that I have also reached, see ¶ 28, "Plaza Realty may not have liked the drift of

the preliminary determinations in the Planning Commission's review, but the drift of those determinations is not ripe for our review."

To the extent that *Annable v. Board of Environmental Protection,* 507 A.2d 592, 5 (Me.1986) is valid in the context of this Kittery dispute there is no "official interpretation" of an ordinance yet. It does not conclusively appear from the record that the Planning Board has finally decided what it will do, regardless of what the Town Planner may believe or what attorneys for the Town may have argued. It is better for the Superior Court to decline to exercise its jurisdiction under the declaratory judgment act at this time. *See* 14 M.R.S.A. §§ 5951-et seq.

The entry is:

Complaint dismissed without prejudice.

Appendix E–1

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

November 2, 2004

Mr. James S. Burling
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, CA 95834

Re: Kittery Retail Ventures, LLC, et al., Applicants,
v. Town of Kittery
Application No. 04A371

Dear Mr. Burling:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on November 2, 2004 extended the time to and including January 9, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ Gail Johnson
Gail Johnson
Case Analyst

Appendix E–2

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. James S. Burling
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, CA 95834

Clerk
Supreme Judicial Court of Maine
Post Office Box 368
Portland, ME 04112

Supreme Court, U.S.
FILED
FEB 14 2005
OFFICE OF THE CLERK

(2)

No. 04 - 943

In the
Supreme Court of the United States
October Term, 2004

KITTERY RETAIL VENTURES, LLC, *et al.*,
Petitioners,
v.
TOWN OF KITTERY, MAINE,
Respondent.

On Petition for Writ of *Certiorari*
to the Supreme Judicial Court of Maine

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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Respondent.

On Petition for Writ of *Certiorari*
to the Supreme Judicial Court of Maine

MOTION OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS

Counsel for Amicus Curiæ

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Pursuant to Supreme Court Rule 37.2 (a), counsel for *Amicus Curiae* has attempted to secure written consent for the filing of the attached Brief of *Amicus Curiae* from counsel for the Petitioners and Respondent. Although counsel for Petitioners granted such consent, counsel for Respondents did not respond to the request of *Amicus* for written assent pursuant to Supreme Court Rule 37.2 (a). Accordingly, counsel for *Amicus Curiae* hereby moves this Court pursuant to Supreme Court Rule 37.2 (b) for leave to file the Brief *Amicus Curiae* which is submitted herewith. *Amicus* makes this motion on the following grounds:

Amicus Curiæ NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF's members are affected by the business climate in New England, which depends, in part, upon municipal attitudes towards real estate development and growth. A healthy real estate development climate is a mark of a vital and vibrant economy and depends on secure rights for property owners. Furthermore, some of NELF's members are directly interested in the issue of real estate development and land use because they are involved in developing, owning, managing, insuring, and/or financing real property.

NELF has regularly appeared in state and federal

courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. 2000), *cert. denied*, 532 U.S. 1048 (2001). NELF served as *amicus curiæ* supporting the Petitioners in this matter at the Supreme Judicial Court of Maine below. *Kittery Retail Ventures, LLC v. Town of Kittery*, 856 A.2d 1183, 2004 ME 65 (Me. 2004).

Counsel for Petitioners assented in writing to the submission of the attached Brief of *Amicus Curiæ* pursuant to Supreme Court Rule 37.2 (a), a copy of which letter has been submitted together with this Brief to the Clerk of this Court. On February 4, 2005, counsel for *Amicus* contacted William Dale, Esq., counsel for the Town of Kittery, to request written assent for *Amicus* to submit the attached Brief pursuant to Supreme Court Rule 37.2 (a). Counsel for the Town of Kittery did not submit such written assent by the required filing time for the attached Brief, nor did counsel indicate orally counsel's position in regard to the filing of such Brief. Counsel for the Town of Kittery did submit written assent for *Amicus* to file its Brief of *Amicus Curiæ* before the Supreme Judicial Court of Maine.

Amicus seeks to bring to the Court's attention its views, and those of its supporters, concerning the effect of the decision below on the costs of and impediments to rational real estate development. *Amicus* believes that this brief may provide an additional perspective which may aid the Court in

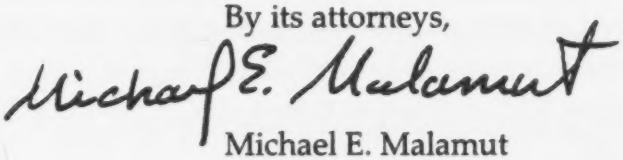
determining whether to grant the petition for a writ of *certiorari*.

Wherefore, NELF respectfully requests that this Court grant *Amicus Curiae* leave to file the attached brief in support of the Petition for a Writ of *Certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,



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Dated: February 14, 2005

QUESTION PRESENTED

Whether a landowner with a pending but unvested permit application is entitled to judicial review under the Due Process Clause when the *retroactive* application of a new zoning law causes the permit to be denied?

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No. 04 - 943

In the
Supreme Court of the United States
October Term, 2004

KITTERY RETAIL VENTURES, LLC, *et al.*,
Petitioners,
v.
TOWN OF KITTERY, MAINE,
Respondent.

On Petition for Writ of *Certiorari*
to the Supreme Judicial Court of Maine

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIÆ*[1]

Amicus seeks to bring to the Court's attention its views, and those of its supporters, concerning the availability of relief under the due process clauses of Fifth and Fourteenth Amendments to the United States Constitution for property owners and developers directly targeted for denial of permits by populist anti-growth movements.

Amicus Curiæ NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is

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1 Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that neither counsel for Petitioners nor Respondent authored this Brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF's members are affected by the business climate in New England, which depends, in part, upon municipal attitudes towards real estate development and growth. A healthy real estate development climate is a mark of a vital and vibrant economy and depends on secure rights for property owners. Furthermore, some of NELF's members are directly interested in the issue of real estate development and land use because they are involved in developing, owning, managing, insuring, and/or financing real property.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. 2000), *cert. denied*, 532 U.S. 1048 (2001). NELF served as *amicus curiæ* supporting the Petitioners in this matter at the Supreme Judicial Court of Maine below. *Kittery Retail Ventures, LLC v. Town of Kittery*, 856 A.2d 1183, 2004 ME 65 (Me. 2004).

Amicus believes that private property and the protection of owners' rights to reasonable development based on established policies are important building blocks of democracy. If the Maine Supreme Judicial Court's decision in this matter is not revisited, property developers will effectively be stripped of the statutory protections of preliminary approvals, such as Maine's "substantial completion," and arbitrarily subject to *ex post facto* land-use restrictions after expenditure of considerable sums in reasonable reliance on such preliminary approvals. The cost of property development will inevitably be higher, as developers will need to compensate for the additional risk that anti-development policies might stymie a project into which a developer has invested considerable financial resources based on preliminary approval. *Amicus* is further concerned that the opinion below in this case will be read to permit regulators and municipal residents to constrain development at any time, in any place, for any reason, so long as they act by referendum.

Amici Curiæ therefore believe that this brief provides an additional perspective which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioners, Kittery Retail Ventures, LLC, *et al.* Pursuant to Supreme Court Rule 37.2 (b), counsel for *Amicus* has moved for leave for the filing of this Brief.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the Brief of Petitioners Kittery Retail Ventures, LLC, ("KRV") *et al.* The Brief of *Amicus* emphasizes in particular the following:

On June 13, 2000, the Respondent, the Town of Kittery ("Town"), approved by referendum an amendment to its Zoning Code that eliminated transferable development rights

and reduced the maximum buildable area for a parcel from thirty to fifteen percent. Pet. App. at A-3, ¶ 4. The development restrictions of the June 13 referendum did not apply to the Petitioners' Kittery Marketplace project because the Kittery Planning Board approved the project's site plan as substantially complete on July 13, 2000, before the referendum's effective date. Pet. App. at A-3, ¶ 5. Under Maine law, the determination of substantial completion constituted "substantive review," which grandfathered the Petitioners' development application and permitted it to proceed under the land-use regulations then in effect, which would include transferable development rights and the thirty percent maximum lot coverage requirement. 1 Me. R.S.A. § 302.[2]

On September 26, 2000, the Town by a further referendum amended the June 13 referendum by making it

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2 **Construction and effect of repealing and amending acts.** . . . Actions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby. For the purposes of this section, a proceeding shall include but not be limited to petitions or applications for licenses or permits required by law at the time of their filing. For the purposes of this section and regardless of any other action taken by the reviewing authority, an application for a license or permit required by law at the time of its filing shall be considered to be a pending proceeding when the reviewing authority has conducted at least one substantive review of the application and not before. For the purposes of this section, a substantive review of an application for a license or permit required by law at the time of application shall consist of a review of that application to determine whether it complies with the review criteria and other applicable requirements of law.

1 Me. S.R.A. § 302.

retroactive to September 30, 1999 (the "Retroactive Referendum"). Pet. App. at A-4, ¶ 6. The Retroactive Referendum was specifically targeted at preventing the development of Kittery Marketplace and one other outlet mall (the "JSS Parcel") equally unaffected by the June 13 referendum because it was also sufficiently advanced in the permitting process.[3] *See* Plaintiffs' Statement of Material Facts, ¶ 29 & Ex. G, found in Appellants' Appendix in the Maine Supreme Court at 46 & 86.

The citizens' group that sponsored the Retroactive Referendum circulated an advertisement that explicitly stated: "The Planning Board has pending applications for retail development of two large-scale malls . . . **which would double the size of current malls!** . . . **Vote YES to stop malls in the Mixed Use Zone on Route 1** . . . ." *See* Plaintiffs' Statement of Material Facts, Ex. G, found in Appellants' Appendix in the Maine Supreme Court at 86 (emphasis in original). Only these two planned outlet malls were affected by the Retroactive Referendum. The Retroactive Referendum could have had no other purpose but to prevent development of the Kittery Marketplace and JSS parcels.

SUMMARY OF ARGUMENT

The Maine Supreme Judicial Court erroneously concluded that the Petitioners had an insufficient property interest to support a substantive due process claim despite the facts that (1) they had obtained substantive review of their application, vesting them with the right to proceed under then existing regulations promulgated pursuant to 1 Me. R.S.A. § 302, and (2) their development rights were then abrogated by

---

3 The other development was the subject of *JSS Realty LLC v. Town of Kittery*, 177 F. Supp. 2d 64 (D. Me. 2001).

a targeted retroactive referendum. *Amicus* supports the contrary position of the Third Circuit that property ownership alone, and not a regulatory entitlement, is an adequate basis for a substantive due process claim charging arbitrary regulatory conduct. This Court should grant the petition for *certiorari* because the decision below would improperly allow municipalities to evade responsibility for targeted disapprovals of development applications.

ARGUMENT

I. The retroactive zoning referendum prohibiting development of the Kittery Marketplace illustrates the harm caused when states define away property rights as unworthy of protection by the due process clause.

The Town violated the Petitioners' rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution[4] because the Retroactive Referendum targeting Kittery Marketplace destroyed development rights granted under Maine law retroactively and arbitrarily targeted Kittery Marketplace based on populist anti-development animus. By highly technical interpretation, the Maine Supreme Judicial Court permitted the Retroactive Referendum to eliminate the Petitioners' right to grandfathered status under the existing regulatory regime at the time their application had received substantive review. 1 Me. R.S.A. § 302.

This case illustrates the tautological nature of defining "property" for due process purposes solely in terms of a claim

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4 The Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." The Fourteenth Amendment states: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

of entitlement to a development permit, as the Maine Supreme Judicial Court does, relying on Eleventh Circuit precedent. *Kittery Retail Ventures, LLC v. Town of Kittery*, 856 A.2d 1183, 1193, 2004 ME 65, ¶ 32 (Me. 2004) (citing *Reserve Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1379 (11th Cir. 1994)). *See* Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 WASH. U. J.L. & POL'Y 61, 93 (2000) ("[T]he entitlement rule is circular. It allows a local government to define what it wants to recognize as an entitlement through its land use ordinance by making land use approvals discretionary."). As indicated by the Petitioners, this interpretation is followed by the Second, Fourth, and Eight Circuits. Petition at 19–23. *See Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997); *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir. 1989). These courts hold that the due process clause protects not traditional property, but property interests that rise to the level of an entitlement. In the land-use context, that means only development permits that are guaranteed under existing regulations, without any role for regulatory discretion, are entitled to due process protection. Mandelker, 3 WASH. U. J.L. & POL'Y at 66.

The Third Circuit, on the other hand, defines property protected by the due process clause, in conformity with history and common sense, to include traditional property ownership itself. *DeBlasio v. Zoning Board of Adjustment for Township of West Amwell*, 53 F.3d 592, 600–01 (3d Cir. 1995) ("[O]ne would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership."), *cert. denied*, 516 U.S. 937 (1995), *overruled on other grounds by United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d

392, 400 (3d Cir. 2003). Under this interpretation, any property owner would have a basis for making a due process claim if treated arbitrarily and irrationally during the course of the land-use application process. Mandelker, 3 WASH. U. J.L. & POL'Y at 90–92.

The Maine definition of due process "property," as limited to entitlement to a development permit, leads to results such as this in which state courts are encouraged to define away development rights as insufficiently certain to sustain a due process challenge. Defining property as entitlement to a specific development permit, the Maine Supreme Judicial Court was able to brush aside the Petitioners' grandfathered development rights because they did not qualify as "vested rights" as defined in other Maine cases.[5] Grandfathered substantive review rights, the court said, were merely a matter of statutory interpretation, which did not rise to the level of "vested rights," and therefore could be eliminated retroactively by a sufficiently specific ordinance. *Kittery Retail Ventures*, 856 A.2d at 1191, 2004 ME 65, ¶ 21.

The court similarly cursorily dismissed Petitioners'

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5 Maine law recognizes both legal and equitable "vested rights," which entitle a specific development plan to be completed unaffected by subsequent regulatory changes. Under Maine law, this is a stronger protection than substantive review rights, which entitle a developer to maintain the regulatory *status quo* through the completion of the application process, but does not guarantee a specific development plan. A developer may obtain legal vested rights only by commencing physical construction after issuance of a building permit. *Sahl v. Town of York*, 760 A.2d 266, 269–70, 2000 ME 180, ¶¶ 12–13 (Me. 2000); *Seven Islands Land Co. v. Maine Land Use Reg. Comm'n*, 450 A.2d 475, 481 (Me. 1982). Alternatively, a developer may obtain equitable vested rights in Maine through, *e.g.*, "bad faith" zoning. *Kittery Retail Ventures*, 856 A.2d at 1191, 2004 ME 65, ¶ 24; *Thomas v. Zoning Board of Appeals of Bangor*, 381 A.2d 643, 647 (Me. 1978).

argument that the Retroactive Referendum targeted Kittery Marketplace, constituting "bad faith" zoning, which should create equitable vested rights under Maine law. Appellants' Brief in the Maine Supreme Court at 15–19. *See Thomas v. Zoning Board of Appeals of Bangor*, 381 A.2d 643, 647 (Me. 1978). Under Maine law, a zoning decision made on a discriminatory basis for the purpose of preventing an otherwise legal use by the applicant constitutes "bad faith" zoning. *Kittery Retail Ventures*, 856 A.2d at 1191, 2004 ME 65, ¶ 24; *Thomas*, 381 A.2d at 647. Nevertheless, the Maine Supreme Judicial Court completely ignored the Petitioners' arguments that the townspeople, through the targeted populist *referendum*, engaged in bad faith conduct creating clearly constitutionally protected vested property rights. Similar populist anti-development prejudice has become widespread in many localities. *See* William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's "Privatizing the Neighborhood,"* 7 Geo. Mason L. Rev. 881, 881-82 (1999) ("NIMBYs ['Not In My Back Yard' advocates] are mostly nearby homeowners who object to further development within their community.").

Rather than dealing with the targeted anti-growth discriminatory animus underlying the Retroactive Referendum, the Maine court's entire discussion of bad-faith-conduct-based vested rights was an exoneration of the conduct of town officials, whose conduct the Petitioners did not question. *Kittery Retail Ventures*, 856 A.2d at 1192–93, 2004 ME 65, ¶¶ 28–31. By failing even to discuss the possibility of the referendum's bad faith targeting, as indicated by the referendum supporters' campaign literature aimed at stopping Kittery Marketplace and only one other development, the Maine court implicitly suggests that bad faith municipal conduct may be insulated

from review because it takes place through a referendum rather than by town officials.

The referendum process allows potentially uninformed popular sentiment to influence land-use decision making. If courts, such as the Maine Supreme Judicial Court, will not even review such referendum decisions as affecting a protected due process property interest, property owners and developers will be faced with high costs in time and money for increasingly arbitrary and unpredictable returns.[6] Uncertainty caused by such strong anti-development sentiments limits much needed development and increases the premiums developers need to calculate before considering a project. That means that those types of projects that return high premiums will be favored over more economically efficient low-premium projects.

If traditional property ownership itself is not sufficient to warrant substantive due process protection, property owners will have no protection against the most egregious populist anti-development land-use decisions, such as the targeted retroactive zoning amendment in this case. Because the Maine Supreme Judicial Court defined away any guarantee of development under Maine law, the Petitioners had no "entitlement" to a development permit. Hence, under the Maine court's interpretation, they had no rights at all under the

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6 For example, in this case, Kittery Retail Ventures spent over $300,000 on its the development application after receiving assurances from town officials that Kittery Marketplace could receive grandfathered status protecting it from subsequent zoning amendments. *See* Plaintiffs' Statement of Material Facts, ¶¶ 1, 40, found in Appellants' Appendix in the Maine Supreme Court at 39 and 48; Affidavit of Edward W. Huminick, Plaintiffs' Statement of Material Facts, Ex. A, ¶ 2 (purchase price), ¶ 27 (development costs after assurances of zoning stability), found in Appellants' Appendix in the Maine Supreme Court at 50 and 56.

due process clause to fight arbitrary, targeted land-use regulation.

Under the Third Circuit's common sense interpretation of the due process clause, the Petitioners' underlying property rights in the Kittery Marketplace site alone are a sufficient basis for invoking due process clause protections. The question then properly focuses on the extent of government misconduct that warrants sanction under the due process clause. *See United Artists Theatre Circuit*, 316 F.3d at 400. The Maine Supreme Judicial Court's decision below, to the contrary, restricts due process protections to developers entitled to a specific development permit. This interpretation gives populist anti-growth movements significant opportunities to derail real estate development approved by professional planners, irrespective of the professionals' judgment that the project should go forward and no matter how much money the developers have devoted to the project, causing significant economic inefficiencies.

II. Property ownership warrants substantive due process protection from discriminatory and arbitrary conduct by local land-use decision makers.

The plain wording of the due process clauses of the United States Constitution grant significant protection to property. U.S. Const. Amend. V, Amend. XIV. When the due process clauses were written, "property" above all meant ownership of real property. *See* James Madison, *Property*, in THE MIND OF THE FOUNDER 186 (Marvin Meyers ed., rev. ed. 1981) (originally published in NATIONAL GAZETTE, March 29, 1792) (property, "[i]n its larger and juster meaning ... embraces everything to which a man may attach a value and have a right .... [A] man's *land*, or merchandise, or money is

called his property." (emphasis added)). "[T]he Framers would have considered [it] obvious [that] our civil rights [protected by the due process clauses] include the full use and enjoyment of the property we own, free from arbitrary or unreasonable government interference." Stewart M. Wiener, Comment, *Substantive Due Process in the Twilight Zone: Protecting Property Interests from Arbitrary Land Use Decisions*, 69 TEMP. L. REV. 1467, 1488 (1996). *See id.* at 1491 ("[T]he Framers[] inten[ded] to provide strong protection for individual rights in property").

Substantive due process is the means to protect real property owners from irrational or arbitrary land-use decisions, which includes decisions by popular referendum based on discriminatory animus rather than fact. *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928).[7] *See* Brian W. Blaesser, *Substantive Due Process Protection at the Outer Margins of Municipal Behavior*, 3 WASH. U. J.L. & POL'Y 583, 585 (2000).[8] To comply with due process, land-use regulations as applied must "bear a *substantial* relation to the public health, safety, morals, or general welfare." *Nectow*, 277 U.S. at 188 (emphasis added). Moreover, whether a land-use regulation complies with due

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7 A court may set aside a land-use decision that "'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'" *Nectow*, 277 U.S. at 187–88 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

8 The right not to be subject to arbitrary or capricious action by a governmental, legislative, or administrative action is a substantive due process right. In the case of irrational or wrongful and use regulatory decisions that may not amount to a taking, landowners and developers have relied on substantive due process claims in federal court as an important means to remedy such action.

Blaesser, 3 WASH. U. J.L. & POL'Y at 585.

process requirements is a question of fact. *Id.*

In this day and age, many land-use decisions involve considerable discretion on the part of local administrative decision makers. Blaesser, 3 WASH. U. J.L. & POL'Y at 600 ("[M]any local governments are currently attempting to address increasingly complex, sometimes subjective issues—preservation of 'community character,' urban design, 'cumulative impacts' of land uses, growth control, environmental protection, affordable housing and infrastructure needs—through discretionary regulation . . . ."). *See id.* at 584. The infusion of considerable discretion into regulatory determinations allows a considerable role for "improper motives such as personal animus, political bias, or conflicts of interest" in the decision making process. *Id.*

Under the "entitlement to a permit" approach adopted by the Maine Supreme Judicial Court, those highly discretionary zoning decisions in most need of review are precisely the decisions that are exempt from due process review. While the discretion of individual decision makers is undoubtedly entitled to substantial deference, unbridled discretion insulated from review inevitably leads to arbitrary and capricious decisions. "Power tends to corrupt and absolute power corrupts absolutely." John Dalberg-Acton (Lord Acton), *Letter to Bishop Mandell Creighton* (April 5, 1887).

Abuse of regulatory discretion can only be redressed if this Court adopts the Third Circuit's definition of "property" for substantive due process as protecting traditional property ownership and not only entitlement to a specific land-use permit. *See* Blaesser, 3 WASH. U. J.L. & POL'Y at 601. That way, there will be a recourse for property owners who are treated arbitrarily during the application process, before their permit

application receives final approval. Otherwise, those forms of arbitrary regulatory conduct most likely to cause the greatest abuse to property owners' rights, because they allow the greatest leeway for regulators' potentially arbitrary discretion, will be those most insulated from any remedy.

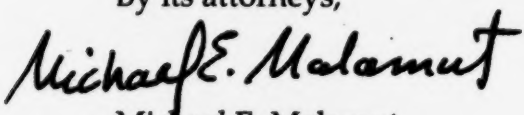
CONCLUSION

For the reasons stated above, this Court should grant the petition of Petitioners Kittery Retail Ventures, LLC, *et al.* for a writ of *certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,



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